



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 14, 2022

IN THE MATTER OF:

Appeal Board No. 624948

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determinations disqualifying the claimant from receiving benefits, effective January 6, 2022, on the basis that the claimant voluntarily separated from employment without good cause and, in the alternative, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to January 6, 2022 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer and the Commissioner of Labor. By decision filed July 11, 2022 (), the Administrative Law Judge overruled the initial determinations.

The Commissioner of Labor appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement submitted on behalf of the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed as a full-time senior employment security clerk by the employer, the New York State Department of Labor from August 31, 2020 through January 6, 2022. Her duties included taking claims and making payments. She worked 100 percent remotely.

In October 2021, the Governor's Office of Employee Relations ('GOER') directed all state employees, including DOL employees and remote employees, to be tested weekly for COVID-19 unless fully vaccinated and to submit proof of vaccination or weekly testing results via an online portal from GOER approved vendors. The claimant chose to have weekly testing instead of vaccination. She was not medically advised to refrain from becoming vaccinated. Employees could get in-person testing from approved vendors or have home kits mailed to them. The claimant did not submit test results for 13 consecutive weeks from approved GOER vendors. On December 15, the employer received a testing result for the claimant, but the reported test results were not from an approved vendor. She had not been tested at an approved in-person site weekly.

On December 21, the claimant received a letter, dated December 13, from the employer directing her to submit testing results from a GOER approved test vendor or proof of her full vaccination status via the online portal no later than December 23. The employer informed the claimant that the vendor she had gone to was not an approved vendor. The claimant reported that two of her home health test kits had been stolen and she was waiting for two more kits.

Between December 27 and December 30, the claimant contacted GOER and left voicemail messages that she had sent two home test kits out and was waiting for the results. On December 30, the employer sent the claimant an email stating it had not received uploaded submissions from the claimant and that it intended to terminate her employment effective January 5, 2022. However, if prior to January 5, the claimant informed GOER of test results from a GOER approved vendor or proof of her full vaccination status then the termination recommendation would be re-evaluated.

On December 31, the claimant called out sick from work because she was having COVID symptoms. She called and left voicemail messages for at GOER that she did not feel well and that she would get tested on January 3. On January 3, the claimant left her home to take an in-person COVID-19 test at an approved vendor. She contacted GOER and left a voicemail message that she had just taken a COVID-19 test. On January 5, the claimant left voicemail messages for GOER that she had not yet received the test results.

On January 6, the employer ended the claimant's employment because she did not submit weekly COVID-19 test results as directed by GOER in violation of the employer's policies. That same day, the claimant received a positive COVID-19

test result. She was not supposed to be vaccinated for COVID-19 because she had tested positive and was having symptoms, but she became vaccinated anyway.

OPINION: The credible evidence establishes the claimant lost her employment because she did not submit weekly COVID-19 test results. She was aware of the employer's requirement for weekly testing from GOER approved vendors since October 2021. The December 13 letter provided her a deadline of December 23 to comply or face administrative corrective action up to and including termination of her employment and she did not comply by the deadline. Of further significance, the December 30 letter informed her that it would re-evaluate the recommendation if she submitted test results prior to January 5. However, the claimant did not submit test results. Although she tested positive for COVID-19 on the last weekend and became vaccinated on the same day of her notification of discharge, this does not excuse her failure to comply with the employer's reasonable work condition for the preceding three months. Significantly, she could have received the vaccination months earlier or have been tested at an approved in-person site weekly. As she had been warned about the need to submit weekly testing, and as her failure to comply with the testing procedure is not excusable, we conclude that the claimant's actions constitute misconduct for unemployment insurance purposes.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective January 6, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to January 6, 2022 cannot be used toward the establishment of a claim for benefits, is sustained.

The claimant is denied benefits with respect to the issue decided herein.

RANDALL T. DOUGLAS, MEMBER